Office-Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

81-134

No. _____

IN THE

Supreme Court of The United States

WILLIE POWELL,

Petitioner

vs.

ELIZABETH POWELL,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND TO THE THIRD DISTRICT COURT OF APPEAL

CARL M. STEIN
(counsel of record)
JENNINGS & JENKS
3435 American River Drive, Suite C
Sacramento, CA 95825
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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE CALIFORNIA SUPERIOR COURT IN AND FOR THE COUNTY OF SACRAMENTO, THE CALIFORNIA THIRD DISTRICT COURT OF APPEAL AND THE CALIFORNIA SUPREME COURT ERRED IN RULING THAT THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION DID NOT PRECLUDE THE CALIFORNIA STATE COURTS FROM DIVIDING MILITARY RETIREMENT PAY PURSUANT TO STATE COMMUNITY PROPERTY LAWS.

PARTIES TO THE PROCEEDING

The parties to the proceeding are: (1) Petitioner, WILLIE POWELL, represented by Carl M. Stein and the Law Offices of Jennings & Jenks, 3435 American River Drive, Suite C, Sacramento, California 95825; and (2) Respondent, ELIZABETH POWELL, represented by Attorney Peter Smurr, P. O. Box 505, Carmichael, California 95608.

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Constitution

Article 6, Section 2	2

Statutes

10 u.S.C.S. 1331 - 1336, 1404, 1405, 1406, 1431-1455, 3929, 2771	1,2

REFERENCE TO OPINIONS BELOW

The opinion of the California Superior Court, the California Court of Appeals for the Third District of the State of California and the order of the California Supreme Court. The opinion of the California Court of Appeals is appended hereto as Appendix A. Petitioner's motion for hearing in the Supreme Court of the State of California was denied and is appended hereto as Appendix B. The Superior Court judgment is appended hereto as Appendix C and Findings of Fact are Appendix D.

JURISDICTION

The opinion of the California Third District Court of Appeals was delivered on February 24, 1981. On April 3, 1981, petitioner timely filed a motion for hearing in the California Supreme Court. On April 22, 1981, (see Appendix B) the California Supreme Court denied the petition for hearing. The jurisdiction for this court is invoked pursuant to the United States Constitution and pursuant to 10 U.S.C.S. 1331 - 1336, 1404, 1405, 1406, 1431 - 1455, and other relevant

sections dealing therewith, including 10 U.S.C.S. 3929 and 10 U.S.C.S. 2771

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those statutes enumerated under jurisdiction, the Constitutional provision which is involved in this writ of Certiorari is Article 6, Section 2, otherwise known as the Supremacy Clause which reads as follows:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution of laws of any state to the contrary notwithstanding."

STATEMENT OF THE CASE

The within case deals with one issue; to wit, whether or not the State of California can impose its community property laws upon a retired military person's pension and retirement pay and

whether or not in doing so, the State of California and its courts are violating the Supremacy Clause of the United States Constitution. This federal question was raised during trial in Superior Court on the issue of whether the military retirement pay was community property. The trial court initially reserved jurisdiction over whether Willie Powell's military retirement pay was community property subject to division by the state court. On September 28, 1980, trial was held at which time through trial brief and through oral arguments as reflected in the reporter's transcript of the proceeding on September 28, 1979, the Supremacy Clause argument was raised and argued. (R.T., pg. 11)

FACTS RELEVANT TO QUESTION I

All factual questions have been handled by stipulation in this matter.

Essentially, this is a domestic relations matter arising under the Family Law Act of the State of California. An initial Interlocutory Judgment of Dissolution was granted and the Final Judgment of Dissolution was subsequently granted. In the Interlocutory Judgment of Dissolu-

tion, the court reserved jurisdiction over the issue of whether or not the military retirement pay of Willie Powell was in fact the community property of the parties. It was stipulated that if in fact the State of California had jurisdiction to divide petitioner's military retirement pay, then respondent herein, Elizabeth Powell, would be entitled to credit for 20.5 years of the 23 years of military service. The issue before the court, therefore, was whether California had jurisdiction to divide the said retirement pay.

REASONS FOR GRANTING THE WRIT

The question of whether or not a state's community property laws may be imposed in such a manner to divide the retiremen pay of an individual who has become entitled to said retirement pay because of his services in the United States Armed Forces has not been decided by the United States Supreme Court. However, the United States Supreme Court, in Hisquierdo v. Hisquierdo, 439 U.S. 581; 59 L.Ed. 2d 10; 99 S.Ct. 802, has ruled railroad retirement pay is not subject to the community property laws of an individual

state.

Petitioner herein finds himself in a position of having to keep the law of the case alive in order to have the benefit of any Supreme Court cases dealing with the issue of military retirement pay. Unless the court grants this Writ of Certiorari, petitioner Willie Powell, will have no recourse and will be bound by the decisions of the State of California. Moreover, the United States Supreme Court in McCarty v. McCarty (decision June 26, 1981, S.Ct. 80-5) has just ruled that military retirement pay is not subject to division by a state court.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to the Supreme Court of the State of California to review this cause for the reasons stated above, and that this Court reverse the holdings of the California Superior Court, the California Third District Court of Appeal and the California Supreme Court.

Respectfully submitted,

CARL M. STEIN

JENNINGS & JENKS

By: MARTIN F. JENNINGS, JR.

CERTIFICATE OF SERVICE

I, Carl M. Stein, a member of the Bar of this court and counsel of record for petitioner, hereby certify that on this 20 day of July, 1981, I served copies of the foregoing "Petition For Writ Of Certiorari To The Supreme Court Of The State Of California And To The Third District Court Of Appeal" upon the California Supreme Court, the Third District Court of Appeal, and the Honorable Joseph A. DeCristoforo, Judge of the Superior Court, State of California and Peter Smurr.

CARL M. STEIN

I, Carl M. Stein, do hereby say as follows:

1. That on July 20, 1981, I deposited in a United States Post Office with first class postage prepaid, and properly addressed to the United States Supreme Court, I mailed this Writ of Certiorari. Said mailing was done at the Federal Post Offices, 2801 Arden Way, Sacramento, California.

Dated: July 20, 1981.

CARL M. STEIN

Sworn to and subscribed before me on the above written date.

Sharon Ford-Lamb

SHARON FORD
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
SACRAMENTO COUNTY
My Commission Expires October 21, 1983

APPENDIX A

OPINION OF ORIGINAL SUBMISSION

In re the Marriage of ELIZABETH POWELL and WILLIE POWELL,

- - - - - - - - - - - - - - - - - -

ELIZABETH POWELL,

Respondent,

vs.

WILLIE POWELL,

Appellant.

No. 3 Civil 19762

Third District Court of Appeals
Eastern District of California

February 24, 1981

Appeal from the Third District Court of Appeal for the Eastern District of California.

Before PARAS, EVANS and BLEASE, Circuit Judges.

PARAS, Acting P.J.

"The sole issue in this case is the validity of our Supreme Court's ruling in In Re Marriage of Milhan (1980) 27 Cal.3d 765, to the effect that the military retirement benefits of a husband can be community property. We do not question the holdings of the Supreme Court; we follow them.

The judgment is affirmed.:

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APPENDIX B

CLERK'S OFFICE, SUPREME COUR
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

APR 22 1968

I have this day filed Order

HEARING DENIED

In re: 3 Civ. *No.* 19762

Marriage of Powell

vs.

Respectfully,

Clerk

by

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APPENDIX C

In re the Marriage of
Petitioner: ELIZABETH POWELL
and
Respondent: WILLIE POWELL

No. 737055
Superior Court of the State of California
In and For the County of Sacramento
May 28, 1980.

Judgment In Re Pension Plan

Superior Court For The State Of California, In And For The County Of Sacramento

Before JOSEPH J. DeCRISTOFORO

"The above-entitled action came regularly for hearing in Department 20 of the above-entitled Court, before the Honorable Judge JOSPEH A. DeCRISTOFORO, without jury. Petitioner, ELIZABETH POWELL, appeared and was represented by the Law Offices of Peter H. Smurr; respondent, WILLIE POWELL, appeared personally and was represented by the Law Offices of Jennings & Jenks. Oral and documentary evidence was introduced during the trial of the case, including points and authorities and memorandum briefs previously submitted which were deemed to be trial briefs by agreement of the parties and made part of the Court's record.

Findings of fact and conclusions of law having been duly entered by the Court, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the retirement fund to the United States Air Force of respondent

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WILLIE POWELL is hereby declared to be, in part, the community property of the parties. Petitioner's share of said retirement is one-half of 20.5 / 23.0.

2. That respondent husband is to receive credit for $600.00 of the first retirement funds to be paid, said retirement benefits commencing on May of '979.

3. That said retirement benfits owed to respondent by petitioner shall be paid on the 15th of each month based on the same ratio being one-half of 20.3 / 23.0 of any payment made until the death of WILLIE POWELL.

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APPENDIX D

In re the Marriage of
Petitioner: ELIZABETH POWELL
and
Respondent: WILLIE POWELL

No. 737055

Superior Court of the State of California
In and For the County of Sacramento
January 25, 1980

Findings of Fact and Conclusions of Law

Superior Court For The State Of California, In And For The County Of Sacramento

Before JOSEPH A. DeCHRISTOFORO

"The above entitled action came regularly for hearing in Department 20 of the above entitled Court, before the Honorable JOSEPH A. DeCRISTOFORO, Judge Presiding, without jury. Petitioner, ELIZABETH POWELL, appeared and was represented by theLaw Offices of Peter H. Smurr; respondent, WILLIE POWELL, appeared personally and was represented by the Law Offices of Jennings & Jenks by C. Breck JOnes.

Oral and documentary evidence was introduced during the trial of this cause, including points and authorities and memorandum briefs previously submitted which were deemed to be trial briefs by agreement of the parties and made a part of the Court's record.

On December 28, 1979, in Department 10, of the above entitled Court, before the Honorable JOSEPH A. DeCRISTOFORO, Judge Presiding, a hearing on findings of

fact and conclusions of law was held. Pursuant to the trial of the within matter and said hearing on objections to findings of facts and conclusions of law, the court amkes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1) That as per testimony of petitioner wife, she and her husband were married and were legally unseparated man and wife during 20.5 years of her husbard's service time.

2) That as per testimony of respondent husband, he retired after 23 years of federal service with retirement pay of $538.91 awarded. He had entered the service on August 20, 1956, and retired on May 1, 1979.

3) That this payment of $538.91 was for retirement only and was not based on disability.

4) That respondent has made no contribution in money to said pension plan were accruing.

CONCLUSIONS OF LAW

1) Pursuant to Gorman v. Gorman, 98 C A 3d 454, said retirement is communtity

property.

2) That by agreement between the parties, the fractional ownership ratio is agreed to be 20.5 (for wife) over 23 (for husband) years of service, i.e. 20.5/23.0.

3) That petitioner wife's share of retirement therefore is one-half of 20.5 of 23 of the retirement amount received by respondent husband.

4) That respondent husband on his retirement received the sum of $538.91 per month.

5) That therefore petitioner is to receive currently the sum of $239.85 based on the total retirement of $538.91 monthly.

6) That pursuant to the stipulated interlocutory decree, respondent husband is to receive credit for $600.00 of first retirement funds to be paid, said retirement benefits commencing on May of 1979.

7) That petitioner wife should therefore not receive any payment for May or June 1979, but should receive the sum of $121.30 for the month of July 1979 and $239.00, more or less, depending on increases and decreases paid by said military retirement thereafter, on the 15th of each

month based on the same ratio being one-half of 20.5/23.0 of any payment made until the death of said WILLIE POWELL.

LET JUDGMENT HEREBY ORDERED BE ENTERED ACCORDINGLY.

Office - Supreme Court, U.S.
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OCT 26 1981
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CLERK

No. 81-134

IN THE

Supreme Court of The United States

WILLIE POWELL,

Petitioner

vs.

ELIZABETH POWELL,

Respondent

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND TO THE THIRD DISTRICT COURT OF APPEAL

Peter H. Smurr
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P.O. Box 505
Carmichael, California
95609-0505
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483-8426

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE CALIFORNIA SUPERIOR COURT IN AND FOR THE COUNTY OF SACRAMENTO, THE CALIFORNIA THIRD DISTRICT COURT OF APPEAL AND THE CALIFORNIA SUPREME COURT COMMITTED ERROR WHICH IS REVERSIBLE BY THE SUPREME COURT OF THE UNITED STATES IN RULING, BEFORE THE DECISION IN McCARTY v McCARTY (decision June 26, 1981, S Ct. 80-5) THAT THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION DID NOT PRECLUDE CALIFORNIA STATE COURTS, PURSUANT TO A STIPULATION OF PARTIES TO THAT COURT'S JURISDICTION, FROM DIVIDING MILITARY RETIREMENT PAY OF AN ALREADY RETIRED EX-SERVICEMAN PURSUANT TO STATE COMMUNITY PROPERTY LAW AS SUCH EXISTED BEFORE THE 26 JUNE 1981 DECISION IN McCARTY v McCARTY, SUPRA.

PARTIES TO THE PROCEEDING

See Petition, page 1.

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395 US 701,706

Cooley v. County of Calaveras 3,4
121 C 482,385-486

Gorman v. Gorman 2
90 CA3d 454

Great Northern R Co V. Sunburst Oil & Refinery Co 7
287 US 358, 365

Hisquierdo v. Hisquierdo 2
439 US 581

In re Mahon 4
123 CA3d 17

Linkletter v. Walker 7
381 US 618

McCarty v. McCarty 1,4,5,6,7
(decision June 26,1981, S. Ct.80-5)

Constitution

Article III, Section 2 1,7

Article 6, Section 2 1,7

Rules of Court

California Rules of Court 1,4
Rule 24 (a)

REFERENCE TO OPINIONS BELOW

See Petition, page 1.

JURISDICTION

See Petition, page 1.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Petition, page 2, and in addition Respondent includes the following:

California Rules of Court, Rule 24 (a), which reads in pertinent part as follows:

> "All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days."

Article III, Section 2, of the Constitution of the United States reads in pertinent part as follows:

"The Judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;..."

STATEMENT OF CASE AND FACTS RELEVANT TO THE QUESTION

This case involves a Stipulated Interlocutory Decree of Dissolution, entered, which divided the property and debts and set the child custody and support duties of parties and reserved jurisdiction in the Court to determine the nature of one-half (1/2) of 20/23rds of the vested ex-enlisted man's retirement rights. Powell v. Powell, with present Petitioner and Respondent decided post Hisquierdo v. Hisquierdo, 439 US 581, and post Gorman v Gorman, 90 CA3d 454, and after Petitioner retired from military service, that such retirement pay was community property following the State Courts long and daily followed historical position and such decision of the State Court became a final

State decision 30 days after 22 April 1981.

The Petitioner Husband has not alleged any payment of retirement funds under the State Court order or other damage, save the declaration of the California Court itself.

The Petitioner Husband created the Interlocutory Decree by Stipulation with Respondent Wife which Stipulation granted among other things the right and duty of the State to categorize the property as separate or community by Stipulated Interlocutory Decree, see Respondent's Appendix E, allowing the Court to reserve jurisdiction for that purpose.

Said State Court's determination was made after hearing on 28 December 1979, following a very long and relied upon, if not unquestioned property rule at a time when the applicable law also included Cooley v. County of Calaveras, 121 C 482 at 485-486, governing the effect of stipulations. The petitioning Husband had at that time already retired after 23 years of service.

There was no limitation placed at any stage of State hearings on the right of either party to appeal or otherwise contest the state decisions.

Cooley v. County of Calaveras, supra, and the later and very recent post McCarty case of In re Mahone 123 CA3d 17 (which held that a completed Stipulation that military retirement was community property in a California Court settlement can not be affected by a later case decision such as McCarty,supra) is based on the California rules of Stipulation and finality of decision.

The case presently before the Court, Powell v. Powell, is a hybrid in which a Stipulation was to allow the State to determine the nature of the retirement fund, and where by the rules of California Court decision's pursuant to the Stipulation, the decision was final before McCarty v. McCarty, supra, was pronounced, by California Rules of Court, Rule 24 (a) and see, In re Mahone,

supra.

The ruling of the California Court in Powell v. Powell is representative of a vast number of such decisions which were daily made prior to 26 June 1981 with the Court and parties before it innocently and justifiably relying on the existing state laws as a fact of marital contracts and decisions thus entered.

Respondent assumes the McCarty v. McCarty decision added the following legal premises to the existing fact and state law.

On 26 June 1981 there was held to be a conflict of terms between state and federal law and the federal scheme of military retirement benefits were held to be threatened with grave harm to "clear and substantial" "federal interests" and potential frustration of the Congressional objectives and goals of using the retirement to induce enlistment and re-enlistment. See pages 22 - 25.

The decision of McCarty v. McCarty, supra,

contained no statement as to retrospective versus purely prospective application except that the McCartys were bound by the decision.

REASONS FOR DENYING THE WRIT

The purpose of the federal position announced in McCarty v. McCarty, supra, does not require retrospective application to affect an ex-serviceman's rights which have been previously decided by a State Court pursuant to a Stipulation to jurisdiction.

Such application would

(i) have negligible, if any, effect on the announced purpose of the McCarty v. McCarty, supra, decision, i.e., to protect federal plans and goals of the federal government regarding servicemen. See, Brown v Louisiana, 447 US 323 at 327.

(ii) create great hardship on the many families who have by necessity, innocently and justifiably relied on and planned pursuant to those existing

state property laws.

Such would be contrary to Great Northern R Co V. Sunburst Oil & Refinery Co., 287 US 358, 365; Chicot County Drainage District v. Baxter State Bank, 308 US 371; Linkletter v. Walker, 381 US 618; and Cipriano v. City of Houma, 395 US 701, 706.

(iii) require recalling for review a multitude of such cases and would impose a formidable cost and boundless new determinations requiring involved remedial rulings attempting to provide solutions to family financing problems.

Article III does not, the Supremacy Clause does not, nor does any other section of the Constitution require retrospective application. Brown v. Louisiana, supra, and Linkletter v Walker, supra.

McCarty v. McCarty, supra, does not state which if any, or when if any, time before 26 June 1981, the facts which became

determinant did so, but the need for present and prospective protection is emphasized.

The standards for non-retrospective application under Brown v. Louisiana, supra at 327, disclose a need for prospective enforcement and non-retro (PHS) application.

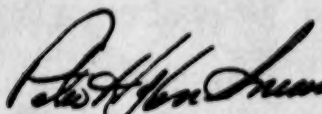
The facts require that save for the McCartys that decisions be applied purely prospectively for retrospective application in our case simply would not affect the federal interests or goals existing 26 June 1981, presently, or in the future, where all parties are retired mature civilians and where the States property rules have been innocently relied upon, regardless of their correctness, and retrospective corrections would be an immense burden on the administration of justice.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that this

Honorable Court deny the issuance of a Writ of Certiorari as McCarty v. McCarty, supra, should be purely prospective in application to all cases save McCarty.

Respectfully submitted,



Peter H. Smurr
Attorney for Respondent

RESPONDENT'S APPENDIX E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

In re the marriage of	Case Number
ELIZABETH POWELL,	737055
Petitioner,	STIPULATED INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE
and	
WILLIE POWELL,	
Respondent.	

IT IS FURTHER ORDERED:

PROPERTY DIVISION

The Petitioner is awarded:

1. The family home at 3637 Karl Drive, North Highlands, California,
2. The household furniture and furnishings,
3. The 1970 Ford Torino automobile.

The Respondent is awarded:

1. The bar from the residence at 3637 Karl Drive, North Highlands, CA.,
2. The 1973 Mazda automobile.

SPOUSAL AND CHILD SUPPORT

1. The Respondent is to pay the sum of $300.00 a month for the support of Reginald and Linda (i.e. $150.00 per month for each child) until each of the above-mentioned children attain the age of majority. Said payments are to being in October of 1978.

2. Respondent is to pay to Petitioner the sum of $100.00 per month as spousal support for a period of 5 years, commencing in October 1978.
3. Commencing in October of 1983, spousal support will be the sum of $1.00 per year.
4. The spousal and child support provisions herein are subject to modification by the Court.

RETIREMENT RIGHTS

1. Petitioner is to be credited with 20.5 years' interst in Respondent's military retirement if same is determined to be community property. Jurisdiction to determine the issue of whether said retirement is community property is reserved. If said military retirement is determined to be community property, Respondent is to be credited with $600.00 of those retirement benefits to compensate for the otherwise unequal division of community property.

////

/////

/////

DATED:

/s/Elizabeth Powell
ELIZABETH POWELL
Petitioner

DATED: 11 December 1978

/s/ Willie Powell
WILLIE POWELL
Respondent

/s/ Peter H. Smurr
PETER H. SMURR
Attorney for Petitioner

/s/ Lillian A. Jenks
LILLIAN A. JENKS
JENNINGS & JENKS
Attorneys for Respondent

DATED: Jan. 23, 1978

/s/ JOSEPH A. DeCRISTOFORO
Judge of the Superior Court

- -

This Appendix E contains only an excerpt of the pertinent parts of the Stipulated Interlocutory Judgment of Dissolution of Marriage.

This Stipulated Interlocutory Judgment of Dissolution of Marriage was filed by the Court on January 23, 1979.

- -

WILLIE POWELL,

Petitioner,

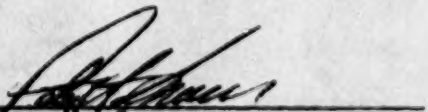
v.

ELIZABETH POWELL,

Respondent.

ENTRY OF APPEARANCE

PETER H. SMURR, a member of the Bar of the State of California and the United States Supreme Court does make an entry of appearance for the purpose of filing, briefing and arguing this Response to Writ of Certiorari and subsequent matters and does make this document an entry of appearance for all purposes.



Peter H. Smurr

DECLARATION OF SERVICE BY MAIL

I, PETER H. SMURR, a member of the Bar of this Court and counsel of record for Respondent, hereby declare that on this 23rd day of October, 1981, I served the within Response to Petition for Writ of Certiorari to the Supreme Court of the State of California and to the Third District Court of Appeal on the California Supreme Court, The Third District Court of Appeal, The Honorable Joseph A. DeCristoforo, Judge of the Superior Court, State of California and Carl M. Stein, by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Carmichael, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 23 October 1981 at Carmichael, California.

Peter H. Smurr